IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,

Petitioner,

vs.

RUSSELL & CO., S. EN C.,

Respondent.

REPLY BRIEF FOR PETITIONER, IN REPLY TO "BRIEF FOR RESPONDENT"

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I.

As to the supposed "impairment of contract".

Respondent's argument misses the point. Of course there is no question, and never has been in this case, on the part of the Government of Puerto Rico, that the Legislature has no power,—and certainly no desire,—to impair, or to escape from the just application of, the 1914 contracts,—nor any others properly made on its behalf. Of course it is beyond the power of the Legislature of Puerto Rico, or of any other department of that government, to impair its contracts. Of course, if,—properly construed,—the effect of the 1921 statute had been to impair the obligation of the 1914 contracts, —properly construed,—then, in so far as it did so, it would

have been beyond the powers granted the Legislature by the Congress under the Organic Act. No one questions that. The Government of Puerto Rico has never questioned it in this litigation. On the contrary, it was said in the brief for the *People of Puerto Rico* filed in this Court in support of its petition for certiorari on the earlier hearing of this litigation here (Case No. 492, October Term, 1932, pp. 39-40):

> "Your petitioner recognizes the soundness and force of those principles wherever they are applicable, and is more than willing that its actions under review in this case, as well as in all other connections, shall be judged according to the standard suggested in the opinion of this court in *Woodruff* v. *Trapnall*, 10 How. 190, 207; that is, 'to be characterized by a more scrupulous regard for justice and a higher morality than belong to the ordinary transactions of individuals.'"

That has consistently been the attitude of the Government throughout this litigation. It is re-stated again, in what was intended to be identically the same language, in our Brief in Support of our Petition for Certiorari in the present case (POINT I-B, pp. 10-11). **The whole question is as to the true meaning and proper construction of the 1914 contracts.** That is plainly a question of local law, primarily for determination by the local insular courts.

As we said in our "Reply Brief for Petitioner, In Reply to Respondent's Brief in Opposition," heretofore filed herein:

The Essentials Appear Plain

> 1. The insular executive authorities negotiating the 1914 contracts possessed no power to deal with anything except the *quantum* of the water to be delivered. The Circuit Court of Appeals so held in construing the contracts twenty years ago;[1] and such was likewise the insular Supreme Court's interpretation of the 1913 statute under which the contracts were made (R. 156).

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[1] *People of Porto Rico* v. *Russell Co.*, 268 Fed. 723, 726; Petition for Certiorari, p. 3.

2. The insular officials did not try to do anything more. That is the insular Supreme Court's interpretation of these contracts, originally drawn in the Spanish language. The contracts say nothing whatever about the cost of delivering the water, or about taxes. As the insular Supreme Court says (R. 156, *supra;* Petition, p. 3):

> "even if a clause like that had been included, we apprehend that it would have been void."

3. That interpretation of the contracts by the insular Supreme Court is not only in harmony with the limitations on the powers of the executive officials making them under the authority conferred by the Act of 1913, and with the language of the contracts themselves, but is also in harmony with the general doctrine that, as against the government, a contract is not to be extended beyond its express terms [*Confer*, Petition, p. 12, and authorities cited]. The applicability of this doctrine is not questioned by respondent.

4. Plainly, the insular Supreme Court's interpretation of these local contracts originally drawn in the Spanish language, and made pursuant to the limitations imposed upon the powers of the insular officials making them by the local insular statute of 1913, is not an unreasonable interpretation. Certainly, to say the very least of it, it is surely not so "patently erroneous", nor so "inescapably wrong", as to authorize the Circuit Court of Appeals to override it (*Sancho Bonet, Treasurer* vs. *Texas Co.*, 308 U. S. 463, 471; *Same* vs. *Fabucoa Sugar Co.*, 306 U. S. 505, 509-511), particularly in view of the fact that it is an interpretation of contracts originally drawn in the Spanish language and dealing with rights arising out of the ancient Spanish water rights law system (*Diaz* vs. *Gonzales*, 261 U. S. 102, 105-106).[2]

5. This is re-inforced by a consideration of the general doctrine that, as between two possible interpretations of a statute,—or of a contract upon the interpretation of which the validity of a statute depends, as

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[2] *Confer*, Petition for Certiorari, pp. 23-24.

here, —that interpretation is to be preferred which will sustain the validity of the statute.

II.

Act No. 49 of 1921 does not contain any undue delegation of legislative power to administrative officials.

Respondent's argument on this point (Brief, pp. 23-27) is plainly mistaken.

A. The insular Supreme Court overruled this contention. It held (R. 151, 154, 156):

> "As to the undue delegation of powers, we think that there is none. The Commissioner of the Interior fixes the water charges each year by performing a definite calculation. Even if the statute did not so specifically determine the computation of the charges we would not hold it an undue delegation of power.
>
> "'The Courts have upheld the validity of statutes authorizing irrigation districts and other districts organized for the same purpose, to levy taxes and assessments, and such statutes do not fall within constitutional provisions regulating assessment and collection of taxes for general state purposes.' 67 C.J. 1337, par. 925.
>
> "The text is supported by *Fallbrook Irr. Dist.* v. *Bradley*, 17 Sup. Ct. 56, 164 U. S. 112, 41 L. Ed. 369; *Turlock Irr. Dist.* v. *Williams*, 79 Cal. 360, 18 P. 379. (R. 151) • • •
>
> "As we shall see later from the Act itself, what the Commissioner does is to fill in details. (R. 154) • • • •
>
> "If the estimate is too high or too low, a surplus or a deficit will result. A surplus will be credited to the budget of the following year, thereby reducing the tax; a deficit will be added to the budget of the following year. Thus, any error committed by the commissioner will be automatically corrected when the next budget is prepared. It will be seen that the Commissioner's discretion does not play an important part in the computation of the tax. Indeed, the commissioner's role could be eliminated and the cost of maintenance estimated some other way. For example, the budget of a previous year to be taken as tentative for the following one.

Such a procedure is followed in estimating the premium rates for the State Insurance Fund.

"The landowner pays the tax in the computation of which the commissioner's report is used. But since any difference between that estimate and the real cost of maintenance is adjusted the landowner is really paying for the exact cost of maintenance.

"Furthermore, it has not been charged, or even suggested that the commissioner's estimates are unjust, or confiscatory.

"We hold, therefore, that the act contains no undue delegation of powers." (R. 156)

The insular Supreme Court thus interprets this local statute as delegating only administrative rather than legislative power.

The Circuit Court of Appeals considered it "unnecessary to pass upon" this question, in view of its decision upon the other branch of the case (R. 191; *Petition for Certiorari*, p. 5, *foot-note* 4).

B. This interpretation of the statute by the insular Supreme Court is wholly in accord with the applicable decisions of this Court and of other courts of the United States. There is no doubt whatever that the power of taxation is a legislative power which cannot be delegated to administrative or executive officials. It is also true that in a general sense the fixing of the amount of a tax levy is part of the legislative function involved in the process of taxation.

But the fixing of the amount of the levy according to this principle does not necessarily nor usually imply the precise determination and specification of the exact sum to be raised. *The condition is met if the law sufficiently indicates the rules and data to be employed to govern determination of the exact amount, so as to leave to executive officials substantially nothing more than the finding of facts and the making of mathematical computations.* This, we think, is all that is done by Act No. 49 of 1921, if the Act is properly interpreted according to its purpose and intent, as it is interpreted by the insular Supreme Court (R. 151; 151-156;

154-156, *supra*]. As that court holds [R. 154]: "What the Commissioner does is to fill in details."

C. When Act No. 49 was enacted in 1921, the irrigation system to which it refers had been in existence and operating for more than six years. At that time it was and ever since has been a well-defined entity whose nature, extent, organization, operating crew and condition were and are firmly established and well known. The function of determining annually in advance the approximate reasonable and necessary cost of maintaining and operating the system for each succeeding fiscal year was and is, therefore, mainly administrative, involving no legislative discretion, but merely the ascertainment of the facts of previous experience and existing conditions, itemized computations of the amounts and costs of labor and material needed for the following year, and the final summing up of items to find the approximate aggregate amount needed. It seems obvious that the Legislature could not reasonably be expected to concern itself with detailed *minutiae* to the extent necessary to formulate the required estimate for each year; and that when it turned the detailed computations over to the Commissioner of the Interior in the manner provided by the Act it adopted a very reasonable and proper solution of the problem, and one which is in harmony with the almost universal practice throughout the United States in dealing with similar problems.

D. It must be noted in this connection, as the insular Supreme Court does [R. 156, *supra*], that the Legislature provided in the same enactment a more or less automatic check against the possibility of excessive levies by prescribing that any surplus realized in the experience of the preceding year must be deducted in computing the levy for the following year. It should also be noted that the Act in effect forbids inclusions in the estimate of any expense for new construction, by providing that **the estimate shall include only "expense of maintaining and operating."** Interpreted

according to the rules of statutory construction the words last quoted must be taken to mean only the expenses of maintenance and operation that are necessary and reasonable.

E. These are all general limitations upon the authority delegated by the Act to the Insular Treasurer and the Commissioner of the Interior. Their joint effect is to leave to those officials very little, if anything, more than the mere finding of facts and mathematical computations. In the required estimate the Commissioner of the Interior can include only necessary and reasonable items of actual cost of maintaining and operating an existing plant. If these limitations are exceeded, then the taxpayer can assert his rights and obtain correction of the assessment by appeal to the insular Board of Review and Equalization under Sections 308 and 310 of the insular Political Code (Compilation of the Revised Statutes and Codes of Puerto Rico in force on March 9, 1911, Sections 2960 and 2962).

F. Special taxes or assessments, such as those here involved, although imposed under the taxing power of the Government, are governed by principles somewhat different in various particulars, in relation to this question, from those which affect general taxation. *Cooley on Taxation*, 4th Ed., Vol. 1, Sec. 31. In the case of a general tax it is usually practicable for the legislative authority to fix precisely either the aggregate amount to be raised by the tax and thus indirectly the rate of taxation, or else directly to fix the rate of taxation, thus indirectly establishing the aggregate amount to be levied. In the case of special taxes or special assessments for local improvements directed by statute or ordinance, it is rarely practicable precisely to determine in the statute or ordinance directing the improvement and authorizing the levy either the precise amount to be raised or the rate of apportionment. In such cases the quite universal practice throughout the United States has always been to delegate the function of fixing these exact figures to commissioners, boards and administrative officials.

Taxation by Assessment, Page and Jones, Vol. 1, Sec. 267, and cases cited.

Fallbrook Irrigation District vs. *Bradley, supra*, 164 U. S. 112, 151, *et seq.*

Lombard vs. *West Chicago Park Co.*, 181 U. S. 33.

French vs. *Barber Asphalt Paving Co.*, 181 U. S. 324.

Wagner vs. *Baltimore*, 239 U. S. 207, 211, *et seq.*

Milheim vs. *Moffat Tunnel Dist.*, 262 U. S. 710.

Kansas City Ry. vs. *Road District*, 266 U. S. 379.

G. Each of the cases last above cited involves a statute or ordinance providing for special assessments for the cost of local improvements where the precise amount to be levied was left for determination by administrative action under general limitations. In each of those cases the validity of the statute or ordinance in question was sustained; and, although it does not appear that in any of them the statute or ordinance was attacked on the specific ground that it delegated legislative authority to administrative officials, the absence of any such attack or even discussion of such a question in the opinions in those cases tends strongly to support the conclusion that the statutes and ordinances there involved were not regarded either by the attacking parties, or by the courts, as subject to objection on the ground of improper delegation of legislative authority.

H. To the same effect are the other cases cited on this branch of the case in the opinion of the insular Supreme Court [R. 151-154].

I. The list of authorities last above cited might be extended almost indefinitely by taking cases decided by the courts of last resort in the various States. The practice is so well settled and of such long standing that we do not deem it necessary in this brief to extend the discussion on this point beyond what has already been said, further than to note the attitude of one of the State appellate courts, as disclosed in the cases next mentioned.

In *Mayor, etc., of Baltimore* vs. *State*, 15 Md. 376, 74 Am.

Dec. 572, the Supreme Court of Maryland was called upon to decide the validity of an act of that State conferring upon a board of police commissioners authority to estimate what sum of money would be necessary to enable them to discharge the duties imposed upon them, and obliging the mayor and city council to raise, by assessment and levy upon assessable property of the city, the sum thus estimated by the board. It was urged that this statute constituted an improper delegation of legislative authority, but the court upheld the validity of the statute against this attack and said (15 Md., *supra*, at pp. 467,468; 74 Am. Dec., *supra*, at p. 588):

> "Under the old system of levy courts and tax commissioners, when appointed by the executive, it was never said that they had not power to make assessments and levy taxes. They were not elected by the people nor accountable to them. They were appointed under legislative authority by the executive, and the state exercised its supreme power of taxing the people through their agency. So here, the state chooses to substitute commissioners in the place of the city authorities for the purpose of levying this tax, and we see no sufficient reason for denouncing the law on that account. That such a power may be delegated, see *Burgess* vs. *Pue*, 2 Gill, 11."

And the same court, considering a similar question with relation to unusual powers conferred upon the State Board of Health by an act of the Maryland Legislature, said in a later case [*Welch* vs. *Coglan*, 126 Md. 1; 94 Atl. 384, 388]:

> "The rule as laid down by the many text-writers is to the effect that the power to tax is inherently a legislative function, to be exercised only by that department of the government, and that it can be delegated only to municipal corporations. 37 Cyc. 725; Cooley on Taxation (2d Ed.) 61, 63, 65. And some of the decisions ably support this view. * * * *Van Cleve* vs. *Passaic Valley Sewerage Commissioners*, 71 N. J. Law, 574 * * *.
>
> "But the proposition of law is by no means as broad as its language might be taken to imply, and in numerous instances authority conferred by Legislatures upon

school boards and school commissioners to fix the amount of the tax to be levied for the maintenance of schools has been sustained.

"The rule in this state is that laid down in *Baltimore* vs. *State* [*supra*], 15 Md. 376, 74 Am. Dec. 572."

J. It follows that at the time of the enactment of the Organic Act for Puerto Rico, March 2, 1917, it had been the almost universal custom throughout this country from the beginning of its history, in ordinances and statutes providing for local improvements, to delegate the function of precisely fixing the aggregate amounts of the assessments against benefited lands, to administrative commissions, boards and officials. When the Congress by Section 25 of that Organic Act (39 Stat. 951, 958) delegated to the Legislature of Puerto Rico "all local legislative powers in Puerto Rico," it must have been with the expectation and intention that the insular Legislature would thereby be empowered to follow the same practice and method with relation to such assessments.

K. The cases cited by the Respondent (*Brief*, pp. 24-26) fail to support it here. Thus, for example, in the case of *Rich Hill Coal Company* vs. *Bashore*, 334 Pa. 449, 498, 7 Atl (2d) 302 (*Brief*, pp. 25-26), the Legislature had attempted to empower the State Department of Labor and Industry to levy a tax or assessment upon all employers in the State, for the purpose of defraying the cost of administering the Act, *but had failed to prescribe any definite rule to guide the Department* in determining the amount of the assessment, or to restrict it to employers benefited. The State Supreme Court found it to be in effect simply a *general tax*, "levied in varying amounts at the discretion of the department."

So also the case of *Van Cleve* vs. *Passaic Valley Sewerage Commissioners*, *supra*, 71 N. J. Law 574, 60 Atl. 214, likewise quoted and relied upon by the Respondent (*Brief*, p. 26), is equally clearly distinguishable from the present case. In that case the State statute there under consideration

purported to delegate to an administrative board power *to incur an indebtedness* against the lands in a sewer district *in any amount not in excess of nine million dollars and to levy annually a tax of unlimited amount* upon the property in the district for the purposes of amortization of said indebtedness and maintenance of the sewer system to be constructed. The sewer system was not only *not in existence* at the time of the attempted delegation of this power to the board, but its nature, extent and purposes were described only in the most general terms without any tangible limitation, express or implied, other than the $9,000,000 maximum, upon the discretion attempted to be conferred upon the board. As above pointed out, such conditions are not present in the case here under consideration. The system whose annual cost of operation and maintenance the Commissioner of the Interior is here empowered to estimate was already in existence, and had been in actual operation for a number of years. Computations of its cost of operation and maintenance involve only fact finding and mathematical computation.

L. *This particular point is of especial importance to the appellee The People of Puerto Rico; because, if the present decision of the insular Supreme Court were to be reversed, it would tend to upset the whole system of established practice that has been followed for more than 25 years, in the imposition and collection from many taxpayers of special assessments for the maintenance and operation of the Southern Coast Irrigation District, doubtless with resultant suits for repayments of moneys heretofore collected and expended.*

III.

The Act of 1921 does not affect respondent's rights under the Treaty of Paris in any way.

Respondent's argument on this point ("Brief for Respondent", "III", pp. 27-29) is plainly founded on respondent's mistaken assumption that the Act impaired its rights

under the 1914 contracts. Since it does not do so, it does not affect its concessionaire rights under the treaty in any way.

IV.

The Act of 1921 certainly does not deprive respondent of an opportunity for a hearing before the taxes become fixed, in any way.

Respondent's contention here is really not understood. It has never been sustained by any court. Respondent has never complained, actually, at any time, apparently, of any particular tax, on that ground. The statute grants the same opportunity for a hearing as with relation to any other tax (Sec. 2, Act No. 49, *Appendix to Petition for Certiorari*, p. 29).

V.

The Act of 1921 does not violate the requirement of Section 2 of the Organic Act that: "The rule of taxation in Puerto Rico shall be uniform".

Here again respondent's contention has never been sustained by any court below. It is in effect a contention for *universality*, not uniformity, in taxation. The same contention was made with relation to this same provision of the Organic Act by the Porto Rico Railway Light & Power Co., back in 1926, and was overruled by the Circuit of Appeals for the First Circuit, in the case of *Gallardo, Treasurer* vs. *Porto Rico Ry. Light & Power Co.*, 18 F. (2d) 918, 923-925.

In that case substantially the same objection was made by the light and power company, to that tax, which is now sought to be made on this point by the respondent here, viz., that the tax as laid by the Legislature was not laid upon all of the objects to which the Legislature might have subjected it, but that the Legislature,—for obvious reasons there, as for obvious reasons here,—had in levying that tax levied it only upon all lands in the island of Puerto Rico, but not upon personal property, and not upon either lands or personal property in the adjacent islands of Vieques and Culebra. The objection here is, analogously,

that in levying this tax the Legislature has levied it only upon the particular properties which for manifest reasons were equitably proper subjects for it, in view of the benefits, and has not levied it on other property. In that case, just as the respondent (*Brief*, p. 31) now does here, the company relied upon the decision of this Court in the old case of *Gilman* vs. *City of Sheboygan*, 2 Black 510, 517, in which this Court in a case arising in Wisconsin applied the established rule that this Court considers itself bound in relation to the interpretation of a State statute or constitution by the interpretation placed upon it by the local State Supreme Court, and accordingly enforced the interpretation which the Wisconsin Supreme Court had there placed upon the Wisconsin Constitution as providing for not only uniformity, but also *universality*, of taxation in that State.

But the Circuit Court of Appeals, in the *Railway Light and Power Company* case, overruled the company's contention and in upholding the validity of the Puerto Rican statute there involved, pointed out the company's mistake in its interpretation of this Court's decision in the *Gilman* vs. *Sheboygan* case, saying (*Gallardo* vs. *Porto Rico Ry. Light & Power Co., supra*, 18 F. (2d) at p. 924):

> "The plaintiff's chief reliance is *Gilman* vs. *Sheboygan*, 2 Black, 510, 17 L. Ed. 305. As the Supreme Court held itself bound (2 Black, 518) by the construction put on the Wisconsin Constitution by the Wisconsin court of last resort, the mere affirmation by that court gives the decision no additional weight; it is in legal effect but a decision, many years ago, of the Supreme Court of Wisconsin. In *Lund* vs. *Chippewa County*, 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 131, the Wisconsin court held that 'the rule of uniformity is not broken merely because a town or city or county raises a special tax for local purposes.' The reasoning of this opinion, made in 1896, is hardly consistent with the rather technical interpretation of the Constitution made in *Gilman* vs. *Sheboygan* and in *Knowlton* vs. *Supervisors*, 9 Wis. 410, a generation earlier. *State* vs. *Supervisors*, 70 Wis. 485, 36 N. W. 396, accords with the later views

of that court. *Cf. Florida Central & P. R. Co.* vs. *Reynolds*, 183 U. S. 471, 480, 22 S. Ct. 176, 46 L. Ed. 283."

CONCLUSION

The case turns on the construction of the 1914 contracts, and of the powers of the local officials making them under the local Act of 1913. ***That is a question purely of local law.*** The Territorial Supreme Court holds that those contracts deal only with fixing the *quantum* of Respondent's fair share of the water, and that they do not bind the government to bear the cost of its delivery; and that the officials making them had no authority to deal with the latter subject, and did not attempt to do so. [Whence it necessarily follows that they were not impaired in any way by the 1921 Act requiring Respondent to pay its fair share of the cost of such delivery.]

That decision of the insular Supreme Court thus interpreting the 1914 contracts [with the local Act of 1913 under which they were made] was clearly right, and was certainly not "inescapably wrong". The decision of the Circuit Court of Appeals reversing it was in error. None of respondent's other points is good. The judgment of the Circuit Court of Appeals should be reversed, and that of the insular Supreme Court should be affirmed.

Respectfully submitted,

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